

Date: July 1, 1991
Case No.: 93-DBA-71

In The Matter of:

Disputes Concerning the Payment of
Prevailing Wages, Rates and Fringe
Benefits by:

OMNI ELECTRIC, INC.,
Prime Contractor

With Respect to Laborers and
Mechanics Employed by the
Contractor on Department of
Transportation FAA Projects
AIP No. 3-39-0077-07 and
AIP No. 3-39-0077-10

APPEARANCES:

Sandra B. Kramer
Elizabeth R. Ashley
Office of the Solicitor
U.S. Department of Labor
For The Secretary

Roger L. Sabo
Schottenstein, Zox & Dunn
For Omni Electric, Inc.

BEFORE:

Bernard J. Gilday, Jr.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is an action under Reorganization Plan No. 14 of 1950 (64 Stat. 1267), the Davis-Bacon Act (40 U.S.C. §276(a) et seq.) hereinafter referred to as the Act, the Airport and Airway Improvement Act of 1982 and the applicable regulations. An Order of Reference was filed on May 24, 1993 charging violations of the Davis-Bacon and Related Acts provisions. The Order of Reference

incorporated the Wage and Hour Division's charging letter of July 9, 1992 and the Prime Contractor's exception letter of August 3, 1992.

Pursuant to notice issued on October 13, 1993, a Hearing was convened on December 14, 1993 in South Bend, Indiana and was continued in progress on December 15, 1993 due to the unavailability of Wage and Hour Division Investigator James D. Porter. A supplemental notice of hearing was issued on January 6, 1994 and the Hearing was reconvened and concluded on March 3, 1994 at Columbus, Ohio.

Stipulations

The Parties stipulated to the following:

1. Omni Electric, Inc. is a corporation with a principal place of business located at 707 Sheridan Avenue, Michigan City, Indiana. It is engaged in general industrial contracting work some of which is electrical in nature.

2. Omni Electric, Inc. entered into a contract with the Toledo-Lucas County Port Authority on December 18, 1990 to install runway lighting and make airport improvements at the Toledo Express Airport.

3. The airport projects identified and described in this contract were funded by the United States Department of Transportation and numbered AIP 3-39-0077-07 and AIP 3-39-0077-10.

4. The airport projects identified and described in the contract were subject to the Airport and Airway Improvement Act of 1982, as amended.

5. The contract by and between Omni Electric, Inc. and the Toledo Lucas County Port Authority required that Omni Electric, Inc. pay laborers and mechanics employed on the construction of this project not less than the wages set forth in OH-90-2, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon and Related Acts.

6. The employees listed on proposed Secretary's Exhibit 3 were employed by Omni Electric, Inc. on the above projects for the periods stated in Secretary's Exhibit 3.

ISSUES

Counsel for the Secretary maintains that the following issues are for resolution:

1. Whether the Prime Contractor was required to pay laborers and mechanics employed on Projects AIP 3-39-0077-07 and AIP 3-39-0077-10 the electrician's rate of \$20.00 per hour and fringe benefits of \$4.34 plus 3.5% per hour for a total of \$25.19 per hour for all hours worked for the project.

2. Whether the work performed by laborers and mechanics of Omni Electric, Inc. on the aforesaid projects is properly classified as electrician's work.

3. Whether the Secretary's investigation properly calculated the amount of \$46,086.59 in backwages owed to thirty-one (31) employees of Omni Electric, Inc. on the aforesaid projects.

4. Whether the aforesaid projects are subject to the applicable regulations at 29 C.F.R., Part 5 and the Contract Work Hours and Safety Standards Act.

5. Whether the contract entered into between Omni Electric, Inc. and The Toledo-Lucas County Port Authority on December 18, 1990 required Omni Electric, Inc. to comply with the overtime pay provisions of the Contract Work Hours and Safety Standards Act.

6. Whether the applicable rates specified in the wage determination (Wage Decision No. OH-90-2) for the projects were a \$15.75 rate plus \$3.00 in fringe benefits for laborers (group 1, Zone 2); a \$15.95 rate plus \$3.00 in fringe benefits for laborers (group 4, Zone 2); and \$20.00 per hour plus fringe benefits of \$4.34 plus 3.5% per hour for electricians.

Counsel for Omni Electric, Inc. contends that the issues are resolution are:

1. Is the Wage Appeals Board without jurisdiction to resolve the work jurisdictional dispute between the Laborers' District Council of Ohio and the International Brotherhood of Electrical Workers.

2. Is this jurisdictional dispute subject to the National Labor Relations Act.

3. Was the work at the Toledo Express Airport improperly "reclassified" under the prevailing wage schedule.

4. Has the type of work performed at the Toledo Express Airport historically been done in and throughout Ohio by members of the Laborers Union.

5. Was the labor rate as determined by the Wage and Hour Division incorrect.

Background

The uncontradicted evidence establishes that runway work at the airport project consisted of the placing of a pre-cast base or concrete junction box, which weighs 1,500 pounds and is twenty-four inches in diameter and three and one-half feet in height, in an excavation. Junction boxes were set from thirty to two hundred feet apart and pre-assembled runway lights, which require only a plug insertion, were ultimately bolted to the junction box. Light was thereby provided to runways and taxiways. From each junction box, which is placed ten feet from the edge of the runway, Omni Electric, Inc. operator employees dug a trench with a backhoe into which Omni Electric, Inc. laborer employees placed PVC conduit pipe of two, four or six inches in diameter, which is plastic and without threading, and through which they pulled non-energized cable. The conduit pipe was connected and eventually set in the junction box, each trench and junction box excavation was back filled and compacted and the entire process repeated. Approximately fourteen or fifteen thousand feet of cable was laid from the last runway or taxiway light to a new electrical block, main power source building where electrical connections were made. Considerable landscaping was also required and completed. (Tr Vol 3, 140-150).

PROPOSED FINDINGS OF FACT

Summary of Hearing Testimony

Christopher Olivarez testified that, for approximately six years, he has been a member of a laborers union, that he solicited and obtained employment with Omni Electric, Inc. at the Toledo airport project, which work lasted eight or nine months and that he was paid the laborers rate, which he believed was \$16.20 per hour. He stated that he assembled runway lights, which came in separate packages, by running a wire through the stem to the light and screwing the light and stem to the base of the unit (Vol 1 Tr 38). He said that, after operators dug trenches with a backhoe, he laid plastic pipe, ten feet in length and two, four or six inches in diameter, at various levels in the trenches, that he glued the plastic pipe together and ran the pipe to each side of the junction box or manhole into which it was inserted about four inches. He said that he pulled wire through the plastic pipe, which he had not previously done on any job, that he was given no instruction on pulling wire, though he experienced no difficulty in performing this task, that, occasionally a boom truck pulled the wire and that on all but one occasion wire pulling was supervised by an electrician (Vol 1 Tr 30-38). He testified that laborers lay plastic and rigid steel pipe, that the wire he pulled was not energized, that he made no

electrical connections and that electricians did all trouble shooting and "tied everything together" (Vol 1 Tr 40).

I found that Mr. Olivarez was a reasonably credible witness.

Michael Farrell, a certificated journeyman electrician since June, 1981 and a job foreman on new lighting and renovation of commercial and light industrial projects, testified that, for three weeks in July, 1991, he was employed by Omni Electric, Inc. at the Toledo airport site (Vol Tr 67-100). He stated that he was hired to run conduit, cable tray and square duct, that he installed raceways through individual regulators for different rows of runway lighting and a large control cabinet in the regulator building. He said that cables were pulled by employees, he learned were laborers, to the regulator building, a distance of one-quarter mile or longer. Mr. Farrell stated that he also worked at the control tower to which cables had been pulled and "were left laying down there" (Vol 1 Tr 74). It was his testimony that, on one occasion, he was instructed to and did pull cable at the runway because of a shortage of employees. He said that he was concerned with what was being done for the reason that cable was laying on the ground amid dirt, rock and stones which get in the cable and which materials can enter the conduit and break the insulation. He testified that conduits must be free of all dirt and that he found no necessary supports for the conduits (Vol 1 Tr 78). He recalled that he was paid \$22.02 and fringe benefits per hour, that he has laid thousands of feet of conduit during work he has been on was at hospitals, shopping malls, nuclear power plants and smaller commercial projects and that, from what he knew, laying conduit and pulling cable was performed by electricians (Vol 1 Tr 83).

On cross-examination Mr. Farrell testified that he is a member of Electricians Union Local 8 which covers inside wiremen, that there is a linemen local of electricians who hang overhead cable and underground lines at the primary site and that he never saw and does not know whether laborers laid conduit and pulled wire. He stated that Local 8 has a known inside agreement, that its members work predominantly on new buildings and that he was paid more per hour by Omni Electric, Inc. than the amount called for in the Local 8 agreement. He said that he has worked on underground systems for parking lot lighting, but that he has done no highway lighting work or airport work until he was employed by Omni Electric, Inc. Mr. Farrell testified that he believed that Local 8 claimed the conduit laying-cable pulling work and that Local 8 had posted an "informational" picket at the airport. He said that he was laid off by Omni Electric, Inc. on July 18, 1991.

I found that Mr. Farrell was a reasonably credible witness.

Michael W. Ramsden, a journeyman electrician for twenty years, was examined and cross-examined for approximately seven hours. His testimony is found in one hundred and eighty-eight pages of the Transcript of Proceedings (Vol 1 Tr 101 through 289). He stated that he is a member of Electricians Union Local 8 and that from 1989 through 1992, he served as the Business Manager, Chief Executive Officer and Administrator of actual union functions. He said that he worked in the Toledo area for seventeen years and that he has laid conduit and pulled cable at various industrial and commercial projects.

Mr. Ramsden testified that, while he was furnished with Omni Electric, Inc. payroll records, he was denied access to the runway-taxiway work site for security reasons, but that he assigned two Local 8 members to enter the airport work area and take photographs. He said that, from the photographs which were taken and delivered to him, he determined that the laying of conduit and pulling of cable being performed by laborers was electricians work. He stated that, from review of the payroll records, seventy-nine percent of the work being performed at the Toledo Airport by Omni Electric, Inc. was done by laborers. He also stated that he had never seen laborers doing work which was performed by Omni Electric, Inc. laborers at the airport.

It was his testimony that the Wage and Hour Division requested a survey of whether conduit laying and cable pulling work at an airport was work typically done by electricians. He stated that, in order to aid in completion of an Area Practice Survey (Gov Ex 6), Local 8 furnished the Form WD 10 to various contractors which supplied requested information and that the nineteen Forms WD 10, with attachments, which were received were forwarded to the Wage and Hour Division. He added that the survey was limited to airport projects in Ohio and portions of Pennsylvania.

He testified that conduit laying and cable pulling is work which should be performed by electricians for the following reasons:

1. Pipe must be shored properly;
2. Pipe must be filled properly;
3. Pipe must be leak free;
4. Pipe must be connected properly;
5. Pipe must be set so that it drains properly;
6. Pipe must be properly rearmed;
7. Cable must have a minimal number of bends.

He stated that instruction in each and all of the foregoing requirements is given in electrical apprenticeship programs and that he received such instruction.

On cross-examination, re-direct and re-cross examination, some of which was no more than marginally relevant and, thusly, is not summarized, Mr. Ramsden testified that he was voted out of office

on June 9, 1992, that he is generally familiar with heavy construction and highway construction projects in which Local 8 is not involved, but which is covered and controlled by the Laborers District Council of Ohio. He conceded that there is no recitation in the wage decision regarding which trade will install runway-taxiway lighting at the Toledo airport and he added that he is not aware that laborers have and do install conduit, but that he knows that pipe fitters and plumbers can and do install PVC pipe. Mr. Ramsden acknowledged that it cannot be determined from the Area Practice Survey what kind of airport work any of the responding contractors performed and he stated that, while he had conversations with Wage and Hour Investigator Porter, he could not recall the content of any conversation. He agreed that he had conferred with Richard Hairopoulos, Job Superintendent, Omni Electric, Inc. concerning the Toledo Airport project, but that an agreement could not be reached for the reason that he and Mr. Hairopoulos were at odds on what work is and is not electrical work. He stated that he did not know whether Omni Electric, Inc. was properly or incorrectly paying employees and he admitted that he was aware that the Toledo Port Authority accepted all of the airport lighting work performed by Omni Electric, Inc.

I found that, throughout much of his testimony, Mr. Ramsden assumed the role of and sought to be an advocate. His direct testimony was responsive and precise. On cross-examination, however, he was, at times, hesitant, argumentative and he tended to answer unasked questions. His obvious interest in the outcome of this case substantially diminished the quality of his testimony.

David A. Dominico testified that he is the Business Manager and Secretary-Treasurer of The Laborers District Council of Ohio which is comprised of twenty-nine Locals, including Local 500 in Toledo, Ohio. He stated that the State Heavy and Highway Agreement (Joint Exhibit 1) was negotiated with the Ohio Contractors Association, which bargains for one hundred and twenty-five of approximately three hundred Ohio contractors and that it covers the 1989 through 1992 period. He said that this Agreement includes airport construction. He testified that there are considerable highway construction projects which include highway lighting and that, during such construction, laborers install conduit, encase it in concrete and pull cable. Mr. Dominico stated that disputes continually arise over what work is to be performed by which trade and that often judicial proceedings are instituted and pursued to resolve the disagreement. He testified that he became involved in the Toledo Airport runway-taxiway project in September, 1991 after the electricians picketed the airport and when he learned that the dispute involved laborers digging trenches, installing conduit, pouring concrete, setting manholes and pulling wire. He stated that he ordered the union laborers to return to work, which they

did. His attention was directed to Joint Exhibit 2 which he identified as records of jobs performed in Ohio by laborers which included laying conduit, pouring concrete, constructing electric manholes, pulling wire and backfilling. It was his testimony that the Union provides training for all members which includes instruction on laying PVC pipe.

On cross-examination, Mr. Dominico testified that the Heavy and Highway Agreement, while it includes airports, does not mention the installation of PVC pipe and pulling cable. He stated that Joint Exhibit 2, the record of Ohio jobs performed by laborers, does not include Lucas County, Ohio and that most of the listed work was highway construction and lighting work. He added that, in performing highway lighting work, Ohio laborers lay pipe, encase the pipe in concrete and pull wire. He also said that the only airport job was the Omni Electric, Inc. project at the Toledo Airport (Vol 1 Tr 290-319).

I found that Mr. Dominico was a reasonably credible witness.

Michael J. Miller testified that he is the Director of Public Agencies, Assistant to the Executive Vice President and, until November 27, 1993, he was Director of Labor Relations of the Ohio Contractors Association, a trade association representing heavy and highway contractors and associated industries throughout Ohio. He said that the Association has five hundred and sixty member companies, of which two hundred and sixty are construction contractors and that Omni Electric, Inc. is a member contractor. He stated that heavy highway contractors do road and highway construction, site work, airport construction and waste water and sewage treatment plants projects. He testified that airport construction involved runways and parking lots work and site work outside buildings. He stated that the Association does not negotiate with any electrical workers unions. Mr. Miller noted that he is familiar with the State Heavy Highway Agreement which was certified to different public agencies for the purpose of establishing prevailing wage rates.

It was his testimony that contractor members Miller Cable Co., Jesse Howard and Omni Electric, Inc. perform lighting installation which involves digging trenches for electrical lines, laying conduit, concrete encasement, pulling wire through the conduit and backfilling trenches, all of which work is done by laborers. He stated that the Ohio Department of Industrial Relations had attempted to require Miller Cable Co. to pay an electrical groundman rate rather than the laborer rate, but that, ultimately, it was decided and agreed that the laborer rate would be paid. He said that the Association provides training for members which includes electrical type installations.

On cross-examination, Mr. Miller testified that the State Heavy and Highway Agreement does not specifically include electrical

type work. He acknowledged awareness that the Wage and Hour Division disagrees with the decision of the Ohio Department of Industrial Relations and with the classification paid by Miller Cable Co., Jesse Howard and Omni Electric, Inc. He added that he knows that the Wage and Hour Division has instituted proceedings against Jesse Howard (Vol 2, Tr 8-26).

I found that Michael J. Miller was a reasonably credible witness.

James D. Porter, a Compliance Investigator for seventeen years with the Wage and Hour Division, testified that, in September, 1991, he was assigned to investigate under the Davis-Bacon Act the Omni Electric, Inc. runway work at the Toledo Airport. He stated that he received a copy of the contract from the Toledo-Lucas County Port Authority which contains a wage determination, but that he included in his investigative reports and official file only parts thereof which he considered germane and important to his investigation. He said that he reviewed the Omni Electric, Inc. certified payrolls, interviewed Omni Electric, Inc. employees, learned the type of work which was being performed, namely, laying PVC pipe, pulling wire through manholes and hooking wire, was being done by laborers and found that such employees were not being paid the electricians rate. He stated that all of these findings were submitted to his superiors.

Mr. Porter also testified that he reviewed the job description for Local 8 people and that he checked the Dictionary of Occupational Titles to learn the work of an electrician. He stated that his superiors instructed him to obtain additional information, that, at his request, Electricians Local 8 provided information for the Area Survey and that, through Counsel for the Laborers, he received information concerning the type of work performed by laborers. He testified that he adhered to his determination that the electricians rate should have been paid and that he proceeded to compute back wages. He said that, in making the computation, he took employees total straight-time hours and computed wages at the electricians rate, subtracted what was paid at the laborers rate and arrived at the difference which was considered due. He stated that Omni Electric, Inc. did not segregate hours and that, in making his computation, an error was made of a few dollars, as the 3.5% is limited to straight-time hours (VOL 3 Tr 8-48).

On cross-examination, Mr. Porter testified that he had not seen or previously investigated a case of this type and that he was aware that both the electricians and laborers claimed the work of installing conduit and pulling cable. He stated that he knew that electricians Local 8 is an inside union, that Omni Electric, Inc. did both inside and outside work and that Omni Electric, Inc. paid employees under the Ohio Heavy and Highway Agreement. He testified that some of the runway work performed by Omni Electric, Inc. laborers is traditionally laborer work and that he

concluded that the electricians rate should have been paid for at least some of the runway work. He said that a Wage and Hour Division Wage Determination Specialist in Chicago, nonetheless, instructed him "to put it all down - we can work it out later." He also stated that he was willing to make adjustments if Omni Electric, Inc. Job Superintendent Hairopoulos could supply some sort of percentage of time spent in laying pipe and pulling wire. He said that it was his belief that both the electricians union and the laborers union could share airport runway work on a 50-50 basis.

Mr. Porter also testified that William Smith of the Chicago Wage and Hour Division directed acquisition of information for completion of the Area Survey. He agreed that in reviewing the Area Survey, Exhibit 6, one would need the actual contract in each case in order to find exactly what work was done by each contractor identified in the Area Survey. He acknowledged that an Area Survey is usually done before and not after the fact. Mr. Porter stated that he knew that Omni Electric, Inc. had done the same work at other airport runways using laborers, including the Cleveland Hopkins International Airport and that he was aware that, in Ohio, lighting work, including the laying of pipe and pulling wire, is performed by laborers (Vol 3 Tr 49-116).

I found that James D. Porter was a highly credible witness.

James H. Chamberlain, Vice President and General Manager of Miller Cable Company for the past twenty-two years and the Manager of all company operations, testified that Miller Cable Company, for the past twenty-three years, has primarily been engaged in roadway and traffic-signal installations. He stated that operating engineers and laborers perform the company's lighting work and that laborers install ducts and wiring and pull conduit wire. The laborer rate is paid and work is performed in Ohio, West Virginia and Western Pennsylvania. He said that Miller Cable Company is a member of the Ohio Contractors Association and that he was a member of the negotiating committee which negotiated the Agreement with the Union. He testified that Miller Cable Company has done one runway lighting installation.

Mr. Chamberlain stated that, approximately eight years ago, Miller Electric Company was involved in a dispute with the Ohio Department of Transportation over whether employees performing lighting work should be classified as groundmen or laborers. He said that this was resolved and that Miller Cable Company continued to identify lighting work employees as laborers and that payment of the laborer rate was also continued. He said that competitors of Miller Cable Company are W. G. Fairchild Company, Jesse Howard Electric, Parram Electric, Advantage Enterprises, Ridge Electric, Wagner Smith Company and M. P. Dory Company. He added that some of the competitors are non-union and that, it is

his belief, that some pay laborer rate for lighting installations. He said that roadway and runway light installations are somewhat different in that runway installations are smaller, that roadway excavations are much deeper, but that cable installation is somewhat similar (Vol 3 Tr 117-130).

On cross-examination, Mr. Chamberlain testified that the one runway lighting project which Miller Cable Company had was in Summit County, Ohio, in the Akron, Ohio area. He stated that Miller Cable Company has had no recent complaints from the Ohio Department of Transportation and that he is aware of only the groundman-laborers dispute which was resolved eight years ago with the Department of Transportation. He testified that, while he hears many comments, he is unsure of the rate paid by competitors for lighting installations (Vol 3 Tr 130-134).

I found that James H. Chamberlain was a reasonably credible witness.

Richard Hairopoulos, Vice President and Job Superintendent of Omni Electric, Inc. since April 17, 1979, testified that Omni Electric, Inc. is a specialty contractor in underground utility projects which include airport lighting, highway lighting, traffic signals, storm and sanitary sewers, water lines, excavations, site drainage and some paving work. He stated that the company has obtained and completed projects in Cleveland, Cincinnati and Toledo, Ohio, Huntington, West Virginia, Lexington and Louisville, Kentucky, numerous areas in Illinois, several sites in Michigan and in eighty of the ninety-two Counties in Indiana. He said that Omni Electric, Inc. has completed more than five hundred lighting projects, of which in excess of one hundred were airport runway-taxiway lighting installations. He testified that the work at the Toledo Airport and at the Cleveland Hopkins International Airport was the same and, at length, he described placement of the precast junction box, excavations for and settings of plastic pipe, the pulling of cable, installation of the edge light and full restoration of the entire area. He stated that Omni Electric, Inc. has an Agreement with Ohio Operating Engineers and Laborers, but no agreement with the International Brotherhood of Electrical Workers. He said that ninety-nine percent of the work of Omni Electric, Inc. is assigned to and performed by operating engineers and laborers and that Omni Electric, Inc. always pays the prevailing wage.

Mr. Hairopoulos testified that he bid the Toledo Airport job and that, except for three weeks in April, 1991, he was on the job from start to finish. He stated that from fourteen thousand to fifteen thousand feet of conduit was laid with cable pulled and he explained that the runway-taxiway edge light is simply plugged in at the junction box and bolted to the concrete base. He said that Michael Farrell performed actual electrical work at the electrical vault and at the airport tower and that Mr. Olivares

primarily did concrete work and very little conduit work. It was his testimony that the lighting work, for more than ten years, has been claimed by concrete finishers, by ironworkers, by carpenters and that the electricians have laid claim to all of this work. He acknowledged the existence of a groundmen rate which is \$4.00 less per hour than the laborer rate and he stated that, early on, he was visited by Donald Moench of Electricians Local 8 who advised him that Omni Electric, Inc. could save money by using electrical apprentices who are paid much less per hour than laborers. He stated that he also conferred with Michael Ramsden, Local 8 Business Agent, who insisted that all of the airport lighting work had to be assigned to electricians, but that Local 8 could not guarantee that experienced personnel could be furnished and that Local 8 demanded full and complete control so that it could remove Omni Electric, Inc. employees who had been working on the project. He added that no agreement could be reached with Local 8 and that, thereafter, Local 8 distributed handbills, which were unflattering to him, and established picket lines.

Mr. Hairopoulos testified that lighting work performed by Omni Electric, Inc. at the Indianapolis International Airport and at the Canton County Airport was no different than what was done at the Toledo and Cleveland Airports. He stated that, within a three months period, the Wage and Hour Division commenced investigation of two contracts awarded to Omni Electric, Inc. for lighting work at the Indianapolis International Airport and one contract which Omni Electric, Inc. held for lighting installation at the Springfield, Illinois Airport. He said that, to date, no findings have been made and that it is his belief that the investigations were instigated by the International Brotherhood of Electrical Workers (Vol 3 Tr 137-202).

On cross-examination, Mr. Hairopoulos testified that the word "electric" is in the company name for the purpose of attracting general and paving contractors. He stated that less than two percent of the work of Omni Electric, Inc. is electrical and that Omni Electric, Inc. does no building construction. He said that installing a runway-taxiway edge light is as complicated as affixing and plugging in a wall lamp and that it probably could be performed by the Secretary's Counsel. He explained that Michael Farrell did extensive inside electrical work, that he hooked up the constant current regulator and the control circuit. He stated that linemen and groundmen are outside electricians and that linemen, who actually seeks airport lighting work in Indiana, work with high voltage, hot lines. He testified that the Federal Aviation Administration requires that experienced employees perform airport lighting work and that, to comply therewith, Omni Electric, Inc. brought to the Toledo Airport project a skeleton crew of key personnel of approximately forty percent of the work force to instruct and work with local area laborers hired through Laborer Local 500. He stated that he has

determined that members of the International Brotherhood of Electrical Workers have not installed any airport lighting in Northwest Ohio and that Local 8, in particular, stays inside (Vol 3 Tr 202-217).

In response to questions from the Bench, Mr. Hairopoulos testified that testing procedures were in place for checking cable after it was installed and before it was put in service to make certain that it was undamaged. He explained the importance of water tight pipe and how the presence of any leakage is determined. He also stated that, at all times, two journeyman electricians were present at and supervised the Toledo Airport project (Vol 3 Tr 217-223).

I found that Richard Hairopoulos was a highly credible witness.

Proposed Findings

1. Omni Electric, Inc., on December 18, 1990, contracted with the Toledo-Lucas County Port Authority for installation of airport runway-taxiway lighting at the Toledo Express Airport.

2. The airport runway-taxiway project at the Toledo Airport required Omni Electric, Inc. to pay its employees not less than the wages set forth in General Wage Decision No. OH90-2, which was attached to and made part of the contract.

3. General Wage Decision No. OH90-2 is a statewide determination for all of Ohio for the type of construction defined as "heavy and highway construction."

4. At this project Omni Electric, Inc. was required to install precast, concrete junction boxes, weighing one thousand five hundred pounds, approximately twenty-four inches in diameter and three and one-half in height, in an excavation, to excavate trenches for placement of PVC conduit pipe, to pull cable through the conduits, to install manholes at various locations, to connect the PVC conduit pipe, to close and compact the trenches, to bolt pre-assembled runway edge lights onto the junction boxes and plug in the cable. Cable was not energized until all installation was completed. After testing of conduit and cable, renovation and landscape work was completed. All Omni Electric, Inc. employees performing this work were paid the laborer rate.

5. Electrical work, primarily consisting of installation of current regulators and a control cabinet, was performed inside a regulator building by a journeyman electrician who was paid the electrician rate by Omni Electric, Inc.

6. At all times, from commencement to completion of the project, two journeymen electricians, employees of Omni Electric, Inc., were at the work site and served as supervisors.

7. Omni Electric, Inc. is signatory to the Ohio Heavy and Highway Construction Agreement with the Operating Engineers Union and the Laborers Union.

8. Omni Electric, Inc. assigned members of the Laborers Union to the aforesaid runway-taxiway work as it had previously done on its projects for airport lighting in Cleveland, Cincinnati, Lexington, Louisville, Indianapolis and in areas in Illinois, Michigan and West Virginia.

9. The Area Practice Survey is wholly lacking in evidentiary value. The kind and type of work performed by each identified contractor cannot be determined from this survey.

10. The airport runway-taxiway work performed by Omni Electric, Inc. employees, as heretofore set forth, at the Toledo Airport is traditionally done by laborers in Ohio, Kentucky, and Indiana.

PROPOSED CONCLUSIONS OF LAW

1. The contract made and entered by and between Omni Electric, Inc. and the Toledo-Lucas County Port Authority on December 18, 1990 for the installation of runway-taxiway lighting at the Toledo Airport was subject to the Davis-Bacon Act and the Airport and Airway Improvement Act of 1982, as amended.

2. A jurisdictional dispute between competing unions exists. The dispute arises and resolves about which trade is entitled to perform airport runway-taxiway lighting installation and resolution thereof is for the National Labor Relations Board and not the Wage and Hour Division of the U.S. Department of Labor. Nonetheless, under the Davis-Bacon Act, the U.S. Department of Labor has jurisdiction to decide whether employees were correctly paid. Wage cases often tangentially involve jurisdictional disputes.

3. The U.S. Department of Labor can neither decide which competing union or what trade gets what kind and type of work. Nor can the U. S. Department of Labor determine and announce that certain work is electrical while other work is common labor.

4. In a case of this character, the inquiry is exceedingly simple. The sole question for resolution is whether the specific type of airport runway-taxiway lighting installation was traditionally performed by laborers in the same general locality in the recent past.

5. An Area Practice Survey which fails to establish that work done by identified contractors was similar to that which was performed by Omni Electric, Inc. at the Toledo Airport is legally

insufficient. The Area Practice Survey made in this case does not satisfy the Wage Appeals Board standards found in North Country Contractors of Watertown, Inc., WAB Case No. 92-22 (9-3-93).

6. The Area Practice Survey made by the Wage and Hour Division and filed herein is fatally flawed and cannot be the basis for a finding that an incorrect rate was paid to employees by Omni Electric, Inc.

7. There is no evidence that the runway-taxiway lighting installations made by Omni Electric, Inc. at the Toledo Airport were not traditionally performed by laborers in the same general locality in the recent past. To the contrary, the evidence does establish that such work was traditionally performed by laborers in the same general locality in the recent past.

8. Omni Electric, Inc. paid the correct and proper rate to its employees on the Toledo Airport runway-taxiway lighting installation project. Omni Electric, Inc. did not violate the Davis-Bacon Act.

RECOMMENDED ORDER

WHEREFORE, IT IS RECOMMENDED that an Order of Dismissal issue on the ground that Omni Electric, Inc. did not violate the Davis-Bacon Act.

BERNARD J. GILDAY, JR.
ADMINISTRATIVE LAW JUDGE

Notice of Appeal Rights

Within forty (40) days after the date of this Decision and Order any Party aggrieved thereby may file a Petition for Review of the Decision and Order with supporting reasons. Such Party shall transmit the Petition in writing to the Wage Appeals Board, pursuant to 29 C.F.R. §6.34.

